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Supreme Court, U.S.
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No. 95 - 1224

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

EDITH HOROWITZ BROIDA,
Petitioner,

v.

ALVIN EDWARD HOROWITZ, et al,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITIONER'S REPLY BRIEF, or SUPPLEMENTAL BRIEF, and APPENDIX

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March 16, 1996

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This Court is advised that the Report and Recommendation of the Magistrate of the District Court accepted without review by the District Judge is included in this Reply Brief since it was not included in the Brief with the Petition since Petitioner Made a Motion on January 11, 1996 that this Court review this case together with 95-914

THE ISSUE BEFORE THIS COURT IS THE CONSTITUTIONAL RIGHT OF PETITIONER TO ACCESS TO FEDERAL COURT JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP WHERE CLEARLY DOCUMENTED EVIDENCE PROVES PETITIONER'S LONG HELD PHYSICAL DOMICILE IN A DIFFERENT STATE FROM ALL RESPONDENTS, REJECTED IN A CLEARLY ERRONEOUS DISTRICT COURT RULING, AFFIRMED ON APPEAL WITH ORAL ARGUMENT DENIED

The United States Supreme Court established in landmark case Morris v. Gilmer, 129 US 315, 328 SCT 289, 32 LED 690, 1889 very clearly that every citizen has the right to a change of domicile whenever wished with no period of residency necessary.

In Ogden v. Ogden, Florida's Supreme Court ruled, "The best proof of one's domicile is where he says it is." 33 So2d 870,1948

Opinions of the Attorney-General, Florida, 1958 stated: "There is no definite period of time necessary to create a domicile, and one day may be sufficient provided intention to create a domicile exists." 058-247, and, "In order to abandon a domicile there must be a choice of a new domicile with intention that it be the principal and permanent residence." 058-247,1958

In 1875, 88 US 352, 22 LED 584, Mitchell v US the US Supreme Court clearly states: "Domicile is residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."

In 1914, the Supreme Court Justices held: "Residence, in fact, and the intention of making the place of residence one's home are essential elements of domicile. The actual fact of residence and the real intention of remaining there as disclosed by his entire course of conduct are the con-

trolling factors in ascertaining his domicile." Gilbert v. David, 235 US 561,569, 35 SCT 165, 166, 59 LED 36.

Review of the written evidence, oral testimony of Petitioner, evidentiary exhibits in the Appendix in this cause, the Appendix in companion case, this court, 95-914 ,additional exhibits in district court record shows Petitioner in strict compliance with the cited cases.

1. Petitioner filed suit in this and companion case 95-914 in federal district court April 7, 1992, claiming federal diversity jurisdiction, as domiciled in Washington, D. C.since December 7, 1987, five years earlier.

Respondents never presented any evidence that she did not have a continously phyical permanent residence in Washington, or that her residence in Dade County, was anything other than temporary.

Petitioner's continuous physical residence in Washington was proved by written evidence of paying homeowner's insurance since 1976,continuously through the suits in court; filing of front pages of the insurance policies for years 1989,1990, '91,'92; the insurance company's branch office in Northern Virginia's statement they insure the residence and auto for that residence. Insurance companies have jurisdiction to insure cars for a main residence when used in other states, and could insure the car used in Florida. In fact,a car purchased in Florida was titled in Washington with an extra sales tax paid by Petitioner. Petitioner can prove the same Virginia office insured her car purchased in Washington in 1969, and that later on she switched her homeowner insurance to them.

Other evidence from friends who had cor-

responded to her in Washington; friends and relatives who visited with her there; letters from her parents; correspondence with Philadephia Internal Revenue Office which is the office for Washington; transportation records showing the constant travel between Washington and Miami after she began working as personal representative and attorney in both estates of her parents in Florida, one dying six months after the other; telephone records show calls to parents and others in Dade County, Fla. from her phone in Washington See Letter from attorney Tobias Simon on why had she moved to Washington, Pet Ap,30

Respondent Betsy, daughter of Alvin, spent a weekend at Petitioner's residence, Paula and her husband visited in Washington.

Petitioner has proved indisputably she has kept her WAshington address continuously returning there after these two cases were filed in appeal. Petitioner has satisfied the requirement in Mitchell, supra, p2: "Domicile is residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."

2. Petitioner stated she had no physical residence in Dade County, Fla and had actually moved from a rented apartment lived in for less than a year, but maintained her parents' home as legal residence, voting by absentee ballot from Washington. She continued membership in the Florida Bar. Fla. Bar membership and domicile were continued because her parents might need her legal services.

In December,1987, Petitioner proved she had made a public declaration to all defendants, parties in another federal suit,that her legal domicile is now her residence in

Washington, D. C. She had already been removed from the voting records in Dade County, Florida, as evidence from a statement of the Supervisor of Elections states she is not registered as a voter any longer, and has not been since 1989, and has not voted in any election since 1986.

Petitioner could have made a declaration of change of domicile on the day she filed the two lawsuits and it would have been valid, and in accord with Morris v. Gilmer, S. Ct. 1889 that every citizen has the right to a change of domicile whenever they wish with no period of residency necessary. She made the declaration while in Florida, but if she had been in Europe and made the declaration, as long as she already had a physical domicile existing there would have been no requirement that she return to it to so declare.

PETITIONER HAS SATISFIED the requirement in Gilbert v. David, S. Ct., 1914, that since 1987 when she declared her change of physical domicile to her already existing residence of 24 years to be her domicile as well as her major residence and merged her intention evidenced by the continuous maintenance of the physical residence with the declaration of change and the removal of her legal tie to Florida by vacating her voting rights.

The fact that she was then and until 1989 still a member of the Florida Bar has no probative value. Lawyers can be members of many Bars, but it is where

they maintain their major residence that determines their domicile, and not whether they are practicing law in some jurisdiction which is not their major domicile.

Hundreds of thousands of Americans leave a major domicile to either retire and live in another location either partially or permanently retaining their former domicile as a continuing legal domicile; others work in another location for a few or many years without changing a legal domicile; many work overseas for companies for years without losing either citizenship or their legal domicile in the USA.

Among these are Peace Corps persons who must maintain a legal domicile somewhere in the United States while working overseas for two years or more; federal and congressional employees who do not know how long the job may last and do not change the former legal domicile; and actors working on location in different places; newspaper, television, and radio reporters assigned to various locations within or without the country. These situations are endless.

THE RESPONDENT ATTORNEYS HAVE PRESENTED A FALSE STATEMENT IN ALL COURTS TO DELIBERATELY CONFUSE THE ISSUE BY STATING THAT "PHYSICAL RESIDENCE RELATES TO CONTINUOUS DAILY PRESENCE AT A RESIDENCE".

It is obviously untrue. Legal residence affects many legal rights, even

where a person lives in one county of a State and works in another. Attorney Martone responding in this case, moved from his home in South Miami, Florida after the 1992 major Hurricane which demolished South Miami. He took up residence in Boca Raton, Fla., which is a different city and county, but continued to work at his law office in South Miami for many months, or even more than a year. The Attorney who is a defendant in case no. 95-914, before this court, Samuel Smith, has always lived in the city of Miami, Florida, and since his graduation from law school in 1961 has always worked at the office of his brother already in existence for many years in the City of Miami Beach, a separate and distinct City from Miami., from 1961 to 1987.

The word "physical" as used to denote existing residence means a definite physical location which has been established as a residence, and which can be declared a legal domicile.

The courts have never intended that a person must be present at that physical location on a daily basis in order to claim it as a legal domicile. If a person had a vacation home to which they went once a year or never it can still be claimed as legal domicile.

SECOND ISSUE IS THE REFUSAL OF THE DISTRICT COURT TO FOLLOW FEDERAL PROCEDURE BY REVIEWING THE MAGISTRATE'S RECOMMENDATION DE NOVO, TO ENTER A DEFAULT JUDGMENT ON BETSY NIEVES UNTIMELY MOTION TO DISMISS, AND BEING TOTALLY UNWARE OF ANY OF THE ISSUES IN BOTH CASES

The ruling of the District Judge must be reversed as clearly erroneous. To review the actions of the District Judge is to find he had no idea of what was concerned in both cases. Having set this case for trial twice without a ruling that all defendants were before the court for trial when such motion had been twice made by Plaintiff the District Judge obviously was confused.

Neither did the Appeal Court take any effort to review the very definite proof of domicile, the flagrant mistakes of the evidence in the Magistrate's Report.

In addition the Appeal court clerk delayed this case, lost the petitions for rehearing, having the rehearing come late before the appeal court which refused to expedite its rehearing ruling so that Petitioner could bring both cases to this court on the same Petition. The appeal court used no law in support of its ruling, and no facts. It also refused oral argument after having held such in other cases in Miami, only notifying Appellant in its final ruling of such denial. Both the district court and appeal court have exceeded their jurisdiction.

While this is not a civil rights case Petitioner was deprived of civil rights in State court by the personal relationships between judges and defendant lawyers, and has been deprived again of civil rights in federal court b y refusal of judges to follow the law.

THE POSITION OF ATTORNEY MARTONE

Attorney Martone has no knowledge of the Estate of Maurice Horowitz probated in Dade County, Florida or the two federal court cases arising from it. This is probably the first time he has ever been involved in litigation. He informed Petitioner that he is an immigration attorney, although he is a lawyer in Florida since 1970. He is without knowledge of Rules of Procedure of any Court of Law.

He is a friend of Alvin Horowitz, but represents Alvin's daughter Betsy, and took substitution for Paula from attorney Bernard Weksler at the end of this case, in district court. He filed the same brief in this case and 95-914 in the Appeal court although the cases are different. He has copied the brief filed by Samuel Smith in case 95-914 for this case. However, his clients received benefits from the Estate of Maurice, by breaching the contract with Petitioner, of more than $120,000. That was a result of the 17 years of Broida's litigation that he complains about, and personal representative work. Had she not litigated against the invalid will, and not defended the eminent domain suit increasing the value of the Estate from $100,000 to $400,000 they would have had no benefit.

Petitioner, litigating in courts from 1954 won 95% of her cases. She won the eminent domain appeal which netted a settlement of an additional $100,000. (Pet Ap,p 17.

above the previous jury verdict of $300,000 obtained by her refusal to accept the $100,000 offered by the condemnor, which jury verdict followed a dismissal, appealed by the condemnor and reversed. From 1973 to 1977 Petitioner resisted the eminent domain taking keeping the grandparents of Respondents Betsy and Paula living in their home. But the lives of their grandparents are of no interest to either of these Respondent descendants.

Petitioner's reputation for honesty, ability, and success was established for a lifetime. If she disqualified judges it is because they had a personal interest in her adversaries and should have disqualified themselves, just as Justice Thomas has disqualified himself in the VMI suit in which school his son is a student, and Justice Souter has disqualified himself in all cases before this court involving the States of New Hampshire of which he was attorney-general.

As a law student Petitioner authored an article for the Symposium issue of the Miami Law Quarterly on Florida Municipal Corporation Law MLQ, Vol VIII,pp 253 -274, 1954 and is published in the University of Louisville Journal of Family Law, She also won a landmark case in 1955 changing the law of domicile in Dade County, Fla. so that a woman having established legal residence apart from her husband for divorce could have the right to vote in a different State from her husband. Petitioner is responsible for the passage of beneficial laws.

The State of Florida is so concerned about the quality of its judiciary that in 1994 the legislature appointed a committee of 19 to investigate ways of reviewing the qualifications of candidates for both election and appointment. During the progress of the case in federal court before Magistrate Bandstra, a lawyer for five years before coming to the bench and only a few years on the bench, having only experience as a government prosecutor, he was applying to be appointed a federal judge, unbeknownst to Petitioner. With five lawyers and a prestigious law firm opposing Petitioner he sought any means of ruling against her for fear these lawyers might affect his application. He deliberately ignored the obvious evidentiary proof of diversity.

Petitioner had already moved that the Judge not assign the case to anyone seeking higher office.

CONCLUSION

The dismissal of this case must be reversed as a deprivation of constitutional right of Petitioner to choose her domicile having proved its legality.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 92-997-CIV-ATKINS

EDITH HOROWITZ BROIDA,
Plaintiff

vs.

ESTATE OF MAURICE HOROWITZ,
through its Personal Representative
Samuel S. Smith, et al.,
Defendants. /

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on (1) defendant Samuel S. Smith's Motion to Dismiss filed on May 26,1992; Defendant Gene S. Rosen's Motion to Dismiss filed on May 27, 1992; (3) Motion of Defendant Karen H. Kaplan to Dismiss filed on June 18, 1992; and Motion to Dismiss of Defendant Betsy H. Nieves filed on July 9,1992. On June 29, 1992 these and all other pretrial Motions in this case were referred to United States Magistrate Judge Ted E. Bandstra by the Honorable C. Clyde Atkins pursuant to 28 USC Sec.636(b). Accordingly the undersigned heard oral argument on these motions on September 10, 1992, and thereafter granted the parties (60) days leave to conduct discovery solely on the issue of this Court's diversity jurisdiction over this action and to file supplemental motions to dismiss together with any factual materials obtained through discovery on this jurisdictional issue. Following the conclusion of this limited discovery period, the undersigned conducted a supplemental hearing on these motions to dismiss on April 6, 1993. Having carefully considered the pleadings, all materials relevant to the jurisdictional issue, oral argument of counsel and appli-

cable law, the undersigned respectfully recommends that all four motions be GRANTED due to this Court's lack of subject matter jurisdiction as explained below.

INTRODUCTION

On May 1, 1992 Edith Horowitz Broida ("plaintiff"),proceeding pro se, commenced this action by filing a complaint against the Estate of Maurice Horowitz, its personal representative, its distributees and their counsel ("defendants"), for "payment of claims" allegedly due and owing from the Estate which was previously administered and discharged in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, Probate and Guardian Division (Case No. 78-1333). In Count I, plaintiff, the daughter of the decedent, seeks payment of $195,000 for prior debts of decedent allegedly owed to plaintiff. In Count II, plaintiff, appears to claim monies allegedly borrowed from from the Estate of Ann Horowitz (plaintiff's deceased mother) to fund the Estate of Maurice Horowitz. In Count III, plaintiff seeks payment for debts allegedly due to the Estate of Ann Horowitz. In Count IV, plaintiff seeks the return of the unused portion of the family allowance and elective share with interest. In Count V, plaintiff seeks payment of fees for the legal services she allegedly performed on behalf of her family members pursuant to an agreement. In Count VI plaintiff seeks additional payment for legal services she allegedly rendered in connection with a prior eminent domain proceeding. Finally,plaintiff demands in Count VII, that the distributees and attorneys repay the monies

they have received from the Estate.

Plaintiff alleges that the Court has original jurisdiction to entertain this action based on diversity of citizenship pursuant to 28 U.S.C. Sec 1332. Specifically plaintiff alleges that she is a citizen of Washington, D. C., and that all other defendants, with the exception of Stephen H. Horowitz, are citizens of the State of Florida. Defendant Stephen H. Horowitz is alleged to be a citizen of California. In addition, plaintiff invokes the federal question jurisdiction of this Court conferred by 28 U.S.C. Sec. 1331 based on alleged civil rights violations under 42 U.S.C. Sec. 1983.

Defendants Samuel S. Smith, individually and as personal representative of the Estate of Maurice Horowitz; Gene S. Rosen, individually and as counsel for certain distributees; and Karen H.Kaplan and Betsy H. Nieves, distributees, have moved to dismiss this action on several grounds. First, defendants argue that this Court lacks subject matter jurisdiction over the complaint in that there is no diversity of citizenship between plaintiff and defendants. In support thereof, defendants argue that at all times since the commencement of this action, plaintiff has been a citizen and resident of the State of Florida. Defendants further note and the complaint alleges that most of the defendants are citizens of Florida. Consequently Defendants argue that diversity of citizenship cannot serve as a basis for establishing this Court's jurisdiction over the subject matter of the complaint.

Second, defendants argue that

plaintiff fails to state a claim for civil rights violations arising under 42 U.S.C. Sec. 1983 so that this statute cannot confer original jurisdiction upon this Court.

Third, defendants argue that the claims alleged in plaintiff's complaint, either directly or indirectly, relate to the prior administration and/or distribution of the Estate of Maurice Horowitz which has been resolved pursuant to a final judgment entered in the Probate Division of Dade County Circuit Court on December 8, 1989. See, In Re Estate of Maurice Horowitz, Case No. 78-1553. Defendants argue that all issues raised by the instant complaint have been previously adjudicated in the state probate proceedings. Thus, defendants contend that the doctrines of res judicata and collateral estoppel bar plaintiff from relitigating her claims in federal court.[1]

CONCLUSIONS OF LAW

A. Diversity Jurisdiction

The primary issue raised in these motions is whether this Court has subject matter jurisdiction over the claims raised in the complaint. As discussed above, plaintiff attempts to invoke this Court's jurisdiction based on diversity of citizenship pursuant to 28 U.S.C.(1332(a)(1), by alleg-

[1] In response to defendants' motions to dismiss, plaintiff has filed a series of motions to strike(D.E.23,31,59), which the undersigned has addressed by separate order.

ing that she is a citizen of Washington D.C., and that defendants are citizens of Florida and California. Defendants challenge plaintiff's allegation of out-of-state citizenship, arguing that plaintiff is actually a citizen of Florida and therefore jurisdiction fails for lack of complete diversity.

Evaluating this issue, the undersigned begins by noting that 28 U.S.C. Sec. 1332(a)(1) provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $50,000, exclusive of interest and costs, and is between-
>
> 1) citizens of different states;....

As the party seeking to invoke this Court's jurisdiction under this diversity statute, plaintiff has the burden of proving that complete diversity of citizenship exists between the parties, i,e, plaintiff must have citizenship different from that of each defendant. Hawes v. Club Ecuestre El Comandante, 598 F2d 698, 702(1st Cir.1979). Such diversity of citizenship must exist at the time this action was filed. Smith v. Sperling, 354 U.S. 91,93,n1(1957).

In order to be a citizen of a state the meaning of the diversity provision a natural person must be both a citizen of the United States and a domiciliary of a state. Las Vistas Villas,S.A. v. Petersen, 778 F. Supp 1202,1204(M.D. Fla. 1991). [2] In this context, citi-

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2The word "States" as used in Sec. 1332 includes the District of Columbia. See 28 U.S.C. Sec. 1332 (d).

zenship and domicile are synonymous. Freeman v. Northwest Acceptance Corp, 754 F2d 553,555(5th Cir.(1985).Domicile is defined as"a residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." Id.,quoting Mitchell v. 88 U.S. (21 Wall) 350,352 (1875). Simply stated, domicile is determined by two factors; residence and intention to remain. Las Vistas Villas, at 1204. In examining these two factors, a court must consider the totality of the evidence of a person's contacts with a state and of her intent to remain there. See Willis, 651 F.Supp at 601. Thus, domicile is evaluated in terms of objective facts so that statements of intent are entitled to little weight when in conflict with facts. See Freeman v. Northwest Acceptance Corp, 754 F2d at 556.

In this case, the objective facts reveal that plaintiff moved to Miami Beach, Florida in November 1934. She attended college in Florida and thereafter began her working life in a women's apparel store operated by her father on Miami Beach . Plaintiff married in 1941 and gave birth to a daughter in Miami Beach on Septtember 21, 1943. Following plaintiff's divorce in 1949, she attended law school at the University of Miami where she earned a law degree. In 1954, plaintiff became a member of the Florida Bar and began practicing law. In January 1963 plaintiff moved to Washington D. C. where she obtained employment with the federal government and participated in several organizations and/or programs including the Foggy Bottom Neighborhood Association, the "Future for

Jimmy" program and the "Upward Bpund"* Program. While maintaining her residence in Washington D.C., plaintiff periodically returned to Florida for extended visits between 1963 and 1971 to attend to family matters. In 1972* plaintiff returned to Florida in order to handle eminent domain proceedings involving her parents' residence on Miami Beach. After approximately five years of litigation, these proceedings concluded and plaintiff returned to Washington D.C. for a brief period of time* Upon the death of plaintiff's mother in 1977, plaintiff returned to Florida where she has continuously spent the last sixteen years embroiled in litigation concerning the probate of both her parents' estates and other related matters. In 1986 plaintiff ran for Dade County Circuit Court Judge. Her campaign brochure lists a myriad of organizations in which plaintiff was a member including, inter alia, the Florida Bar, the Florida Association of Women Lawyers, The Miami Beach Bar Association, The City of Miami Downtown Planning Commission,and Miami Citizens Against Crime. Plaintiff last voted in Florida in 1986.

Most significantly, at the commencement of this lawsuit, and continuing to date, plaintiff receives her mail at a P.O. Box located in Miami Beach, Florida. She maintains an unlisted telephone number in Florida and utilizes an answering located in North Miami. Plaintiff does not presently have a phone listing in Washington D.C. Plaintiff also has a valid driver's license issued by the State of Florida and owns an automobile registered in Florida. Indeed, plaintiff spends and has spent the overwhelming majority of her time in Florida since 1977 except for brief round-

*Petitioner's Note Paid Director by D.C. Model School Div. See Ap;*1974 *Proceedings concluded 1984 for Estate

trip visits to Washington D. c. primarily on her birthday or during the holiday season.

Notwithstanding this evidence, plaintiff urges this Court to view her presence in Florida since 1977 as temporary based on her desire to return to Washington, D.C., her 'declared' domicile, and the presence of her alleged physical residence in Washington D.C. In support thereof, plaintiff points to a petition for removal dated December 7, 1987, filed in a prior probate proceeding, in which she alleges that she was a citizen of the State of Florida until December 4, 1987, when she declared that she was a citizen of Washington D.C. Specifically the petition provides in pertinent part:

The above-entitled action wholly involves citizens of different states. At the commencement of this action in Dade County, Florida, petitioner herein was a resident and citizen of Dade County, Florida , as were the other named defendants in the suit.

a. Petitioner Edith Horowitz Broida is no longer a citizen of Dade County, Florida although residing in Florida. Said petitioner has declared her citizenship as being the District of Columbia, Washington, D. C. where she established residence in January 1963 and has maintained it continuously since. Petitioner declares that citizenship as of December 4, 1987.

See D.E. 55, Exhibit A.[3] Based pri-

[3] Significantly, the proceedings which plaintiff attempted to remove via this petition were remanded to state court.

marily on this"declaration", plaintiff contends that she was a citizen of Washington D. C. at the commencement of this action. See Ogden v. Ogden, 33 So2d 870 (Fla. 1947)("the best proof of one's domicile is where he says it is.") Plaintiff's position is further exemplified by her deposition testimony in which she stated:

Q. Specifically you say you changed your domicile. In a nutshell, how did you do that?

A. By saying so. That's how you do that?

Q. Other than your declaration, what changed on December 4, 1987?

A. Other than my declaration, what changed?

Q. Yes.

A. My declaration changed where I am domiciled.

Broida Deposition,pages 38-39.

With regard to plaintiff's alleged residence in Washington, D. C., plaintiff submits a copy of a letter from Liberty Mutual Insurance Company, Fairfax, Virginia, dated August 17, 1992, stating that it has been issuing homeowners insurance policies on the "Washington D.C. residence of Edith Broida" from 1979* through 1992 and that it also insures her automobile. See Docket Entry 42. However, plaintiff fails to submit the actual policies on this alleged residence. In addition, plaintiff failed to provide an address for this residence or information on whether she owns or rents the residence. Indeed, plaintiff candidly stated,"I will not answer any questions about my residence in either location, in Miami or Washington, and don't ask me any more

*Petitioner's note: error, the letter, Appendix,states date of 1976.

questions on it." Broida Deposition, page 16.

As further evidence of a Washington, D.C. domicile, plaintiff submits the affidavits of Martha Neham Edelstein and Phyllis Shampanier, two long time acquaintances of plaintiff,* who both attest, based on conversations with plaintiff, that plaintiff has a residence in Washington, D. C.*

Reviewing the objective facts outlined above, the undersigned finds that plaintiff has failed to sustain her burden of showing that she is a citizen of Washington, D. C. Specifically, the undersigned places little weight on plaintiff's "declaration" and proof of residency in view of the objective evidence indicating to the contrary. As stated by the Fifth Circuit in Freeman v. Northwest Acceptance Corp. supra:

> ...Words may be evidence of a man's intention to establish his domicile at a particular place of residence, but they cannot supply the fact of his domicile there. In such circumstances, the actual fact of residence and a real intention of remaining there, as disclosed by his entire course of conduct, are the controlling factors in ascertaining his domicile.

Here, plaintiff's course of conduct does not show that she ever changed her domicile from Florida to Washington D.C. at any time after her declaration in 1987. Significantly, plaintiff has failed to present any objective evidence whatsoever of any severing of ties to her Florida domicile subsequent to this declaration.

* Petitioner's Note. two 'friends', Edelstein visited Pet. in her Washington residence; colleague Shampanier wrote her in Washington. See Ap

Moreover, the complaint's factual allegations reflect plaintiff's continuous residency in Dade County, Florida since approximately 1977.*

In summary, the undersigned finds that Plaintiff was a citizen of Flor ida at the time she filed this action. Accordingly, the undersigned recommends that defendant's motions to dismiss be granted pursuant to Fed.R. Civ.P. 12(b)(1) for lack of diversity jurisdiction.

B. Federal Question Jurisdiction

Defendants next contend that plaintiff has failed to establish this Court's jurisdiction based on federal questions arising out of her civil rights claim brought pursuant to 42 U.S.C. Sec. 1983. In order to state a claim under Sec. 1983, a complaint must adequately allege that the conduct complained of (1) was committed by a person acting under color of state law, and (2) deprived the complainant of rights, privileges, or immunities secured by the Constitution of law of the United States. Harvey v. Harvey, 949 F2d 1127(11th Cir. 1992), citing Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 156-57, 98 S. Ct. 1729,1733 (1978).

Reviewing the complaint, the undersigned finds that plaintiff has failed to allege that she was deprived of any right or privilege protected by the United States Constitution or any federal law. Plaintiff alleges that the defendant lawyers improperly influenced the judges presiding over plaintiff's state court proceedings in violation of her constitutional rights to due process and equal protection of the law. Cpt.para 10. However, plaintiff fails to allege any state action on the part of

*Petitioner's note: Ignored by the Court- she has been personal representative and attorney for 2 estates.

the lawyer defendants as required for a civil rights claim. See Fast v Wead, 509 F.Supp. 744(N.D. Ohio 1981) (conduct of clients in representing clients does not constitute state action under color of state law). Accordingly, the undersigned finds that plaintiff has failed to state a claim under 42 U.S.C. Sec. 1983. In so finding , the undersigned notes that plaintiff apparently fails to comprehend that the federal courts ordinarily have no jurisdiction to review state court proceedings. Explaining the court's lack of jurisdiction in an analagous matter , the Honorable James Lawrence King stated:

> The plaintiff has wrongfully invoked this court's original jurisdiction to entertain what is essentially a request for an appellate review of the above-described state court ruling. Therefore, the complaint in its entirety is dismissed, pursuant to FED.R.Civ. P. 12(b)(1), for lack of jurisdiction over the subject matter. It is well settled law that a plaintiff may not seek review of a state court ruling simply by alleging a civil rights violation in his complaint. Even where there is a constiutional error in the state court's decision, the plaintiff's sole recourse is to the state appellate court or the United States Supreme Court, not to the United States District Court. See Hagerty v. Succession of Clement, 749 F2d 217(5th Cir. 1984); Reynolds v. State of Ga., 640 F2d 702 (5th Cir.1981) Dist. of Columbia Court of Appeals v. Feldman, 103 S.Ct. 1303(1983);

Rooker v. Fidelity Trust Co., 44 S.Ct 149 (1923).

See Final Order Granting Defendant's Motion to Dismiss, Pruessman v. McDonald, Case No. 89-1613-Civ-King (S.D. Fla. 1989). Here, as in Preussman, plaintiff's recourse is to the state appellate court or to the United States Supreme Court. The fact that plaintiff was unsuccessful in these forums does not provide this federal court with jurisdiction to decide her claims.*

SUMMARY

Based on the foregoing, the undersigned recommends:

(1) that Defendant Samuel S. Smith's Motion to Dismiss be GRANTED:

(2) that Defendant Gene S. Rosen's Motion to Dismiss be GRANTED:

(3) that the Motion of Defendant Karen H. Kaplan to Dismiss be GRANTED; and

(4) that the Motion to Dismiss of Betsy H. Nieves be GRANTED."

The parties may serve and file written objections to this Report and Recommendation with the Honorable C. Clyde Atkins, United states District Judge, within ten (10) days of receipt. See 28 U.S.C. Sec 636(b)(1)(C); United States v. Warren, 687 F2d 347 (11th Cir.1982),cert.denied, 460 U.S. 1087 (1983); and Hardin v. Wainright, 678 F2d 589(5th Cir.Unit B 1982); see also Thomas v. Arn, 474 U.S. 140(1985)

RESPECTFULLY SUBMITTED in Miami, Florida, this 20th day of May, 1993.

/S/ Ted E. Bandstra
TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE

* Petitioner's Note: Hon. King is a fellow Distr. court Judge, and not a

Copies furnished to:
Honorable C. Clyde Atkins
All counsel of record

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[4] Having so recommended, the undersigned finds it unnecessary to address defendants' res judicata and collateral estoppel arguments as further grounds for dismissal.

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*Petitioner's note cont'd: reported decision. We have no knowledge of that case. This Magistrate ignored petitioner's cited federal law for suits between heirs on claims, and state probate law providing such suit. This case was not decided in state court but dismissed in violation of civil rights as influenced by defendant lawyers conspracy with state judge. Magistrate refused petitioner to argue grounds other than diversity but here rules on them, a further civil rights due process violation.

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BEST AVAILA

The Miami Herald
6-A Sunday, Feb. 27, 1938

Vote Right Of Wife Is Upheld

By C. G. BERNING
Herald Staff Writer

A married woman can acquire a separate Florida residence for all legal purposes, including voting, Circuit Judge Pat Cannon ruled Thursday.

He ordered registration supervisor Carl Holmer to list Zelda Taub Fassberg, a Miami Beach saleswoman, as a Dade county voter as long as she qualifies by having lived in Florida a year and Dade county six months.

Holmer's refusal to register Mrs. Fassberg because her husband lives in New York, caused Mrs. Edith Broida, Miami Beach attorney, to file the unusual suit to test a married woman's right to establish separate domicile from that of her husband.

Holmer told Mrs. Fassberg that she could register to vote only if she obtained a divorce and then resided in Florida one year and Dade county six months.

The Florida divorce law permits a woman to file a divorce suit as a Florida resident after establishing residence for 90 days with intention to remain as a permanent resident.

Mrs. Fassberg came here Nov. 15, 1933 and Mrs. Broida contended that one year from that date, whether or not she wanted a divorce, she was entitled to register as a Florida voter.

Circuit Judge Marshall C. Wiseheart granted her a divorce decree from Philip Fassberg of New York last March 31.

John Reed, assistant attorney general, said Judge Cannon's decision will be appealed to Florida Supreme court. He contends that a married woman's residence is that of her husband with the exception that for divorce purposes only she may establish residence.

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